IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

FRIDAY, THE 29TH JUNE 2007 / 8TH ASHADHA 1929

WP(C).No. 35716 of 2005(B)

PETITIONER:

VEENA MADHUKANT, AGED 45,
W/O.MADHUKANT.R.SHA, RESIDING AT 12/21,
MAHALAKSHMI NAGAR,T.KOTTAMPATTI, POLLACHI,
TAMIL NADU 642 002.

BY ADVS. SRI.K.VINOD CHANDRAN
& SRI.B.JAYASANKAR

RESPONDENTS:
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1. STATE BANK OF INDIA, ALAPPUZHA MAIN
BANCH, REPRESENTED BY ITS ASSISTANT GENERAL
MANAGER.

2. THE RECOVERY OFFICER, DEBTS RECOVERY
TRIBUNAL (KERALA), 8TH FLOOR HOUSING BOARD
BUILDINGS, PANAMPILLY NAGAR, KOCHI 36.

3. THE UNION OF INDIA, REPRESENTED BY
THE SECRETARY TO THE UNION OF INDIA,
NEW DELHI.

R1 BY ADV. SRI.P.V.SURENDRANATH
R2 BY ADV. SRI.S.ABHILASH
R3 BY ADV. SRI. P.PARAMESWARAN NAIR (ASST. SOL. GENERAL)
ADV. SRI.GEORGE K.GEORGE(AMICUS CURIAE)

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 22/06/2007, THE COURT ON 29/06/2007 DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: PROPOSAL DATED 7.2.2001 SUBMITTED BY M/S. UNIVERSAL AGENCIES TO THE FIRST RESPONDENT.

EXT.P2: PROPOSAL DATED 19.9.2001 SUBMITTED BY M/S. UNIVERSAL AGENCIES TO THE PETITIONER.

EXT.P3: A TRUE COPY OF I.A. No.1765 of 21005 in DRC 1036 IN OA No.115 of 2002 FILED BY THE FIRST RESPONDENT BANK SEEKING ARREST AND DETENTION OF THE PETITIONER.

EXT.P4: A TRUE COPY OF THE SHOW CAUSE NOTICE DT.27.10.2005 ISSUED BY THE 2ND RESPONDENT TO THE PETITIONER.

RESPONDENTS EXHIBITS:

EXT.R1(a): True copy of the stock statement dt.31.8.2001.

Ext.R1(b): True copy of the inspection report dated 19.9.2001.

(TRUE COPY)

H.L. DATTU, C.J.,
KURIAN JOSEPH & K.T. SANKARAN, J.

W.P.(C) No.35716 of 2005 B

Dated this, the 29th day of June, 2007.

JUDGMENT

H.L. DATTU, C.J.

The learned single Judge being of the opinion that an important question of law has been raised and canvassed in the writ petition, has referred this Petition for our consideration and decision. The question referred for our consideration is "whether a woman can be arrested and detained in civil prison in proceedings for recovery of debt certified by the Debts Recovery Tribunal".

2. We have heard the learned counsels appearing for the parties to the lis and Mr.K.George, whom we had requested to assist us in the matter.

3. The Recovery of Debts Due to Banks and Financial Institutions Act, 1993, hereinafter for the sake of brevity and convenience is referred to as Act, 1993, is enacted to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto. The resources of the Banks and Financial Institutions are backed by public deposits, public borrowings and budgetary allocations. Being public funds, they are required to have a special

procedure to enforce their own demands. Since the emphasis is on the recovery of dues, the legislature has provided a special machinery for such recoveries, but those procedure are more or less akin to the procedure prescribed under the Code of Civil Procedure and the provisions of the Income Tax Act.

4. The expression 'debt' is defined under Section 2(g) of the Act to mean any liability (inclusive of interest) which is claimed as due from any person by a bank or financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application. Section 2(k) of the Act defines the meaning of the expression 'Recovery Officer' to mean a Recovery officer appointed by the Central Government to each Tribunal under sub-section (1) of Section 7 of the Act.

5. Section 22 of the Act provides that the Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and subject to own provisions of the Act and of any rules, the Tribunals shall have powers to regulate their own procedures. The

Tribunal shall have for the purpose of discharging their functions under the Act, the same powers as are vested in a civil court under the Code of Civil Procedure while trying the suit.

6. In regard to the execution of the order, the jurisdiction of the Recovery Officer is exclusive. Now a procedure has been laid down in the Act for recovery of debts as per the certificate issued by the Tribunal and this procedure is contained in Chapter V of the Act and is covered by Section 25 to 30 of the Act. The certificates granted by the Tribunal requires to be executed by the Recovery Officer.

7. Section 25 of the Act provides the modes of recovery of debts under the Act. The Section reads as under:

> "**Modes of recovery of debts**. - The Recovery Officer, shall, on receipt of the copy of the certificate under sub-section (7) of section 19, proceed to recover the amount of debt specified in the certificate by one or more of the following modes, namely:
> (a) attachment and sale of the movable or immovable property of the defendant;
> (b) arrest of the defendant and his detention in prison;
> (c) appointing a receiver for the management of the movable or immovable properties of the defendant."

8. The Recovery Officer under the Act, on receipt of copy of the certificate under Section 19(7) of the Act, may proceed to recover the amount of debt specified in the certificate by the Mode/Modes provided under the section itself. It could be either by attachment and sale of the movable or immovable property of the defendant; arrest of

the defendant and his detention in prison; and appointing a receiver for the management of the movable or immovable properties of the defendant. In order to recover the debts due from the defendants, the recovery officer has to attach and sell the movable and immovable property and for protection and preservation of the same, he has the power to appoint a receiver for the management thereof. Modes of recovery specified in clauses (a), (b) and (c) of Section 25 of the Act are alternative modes and not exclusive of each other and it is open to the Recovery Officer to resort to one or more of the modes. The use of the expression "by one or more modes mentioned below" makes it clear that the legislature has, with a view to ensure that the dues payable under the Act are recovered, empowered the Recovery Officer to resort to one or all of the modes for recovery of the arrears.

9. Section 28 of the Act provides the other modes of recovery, where a certificate has been issued to the recovery officer under sub-section (7) of Section 19, the recovery officer may without prejudice to the modes of recovery specified in Section 25, recover the amount of debt by any one or more of the modes provided under this section. Proviso to Section 28(2) says that nothing in this sub-section shall apply to any part of the amount exempt from attachment in execution of a decree or a civil court under Section 60 CPC. The expression without prejudice to the modes of recovery contemplated under Section 28 means that the modes of recovery contemplated under

Section 28 are not in substitution nor alternative to, nor in derogation of those specified in Section 25, and that the modes envisaged under Section 28 are supplemental to or in addition of those specified in Section 25 of the Act.

10. Section 29 of the Act deals with application of certain provisions of Income Tax Act. The provisions of the second and third Schedules to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962 as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rates referred to the amount of debt due under this Act instead of Income Tax Act. Any reference under the said provisions and the rules to the 'assessee' shall be construed as a reference to the defendant under this Act. The recovery certificates granted by the Debt Recovery Tribunal shall be executed in the manner laid down in the second Schedule to the Income Tax Act, 1961. Section 29 of the Act has supplemented the provisions of Sections 25 and 28 of the Act by making the relevant provisions of Second and Third Schedules to the Income Tax Act, 1981 as also the Income Tax (Certificate Proceedings) Rules, 1962 as in force from time to time applicable, with necessary modifications to the modes of recovery contemplated under the Act. Section 29 of the Act is, therefore, in legal phraseology, legislation by reference, which denotes an act of materially lifting certain provisions of a different law deeming them as incorporated in the concerned law.

11. Section 36 has empowered the Central Government to make Rules for carrying out the provisions of the Act, yet no Rules have been framed for regulating the procedure of recovery to be effected under the Certificate and even assuming that the Rules have been framed, the same could not have been in derogation to the principles provided in the Code of Civil Procedure, since the Rules contained in the Code of Civil Procedure for recovery under a money decree have themselves incorporated or given vent to the recognised principles of justice, equity and fair play, and cannot be taken exception to, even while effecting a recovery under Section 25, 28, or 29 of the Act, particularly because the proceedings before the Tribunal and, likewise, the proceedings of recovery or other judicial proceedings which have to be informed with settled cannons of justice, equity and good conscience.

12. Having seen the relevant provisions, now it is desirable to refer to the observations made by the Apex Court while considering the vires of the Debts Recovery Tribunals Act in the case of **Union of India and another vs. Delhi High Court Bar Association and others,** (2002) 4 SCC 275. The Delhi High Court in Delhi High Court Bar Association vs. Union of India, AIR 1995 Delhi 323, has struck down the appointment of the Recovery Officer and the modes of recovery of debts under Sections 25 and 28 (1) and (2) as being arbitrary, unreasonable and without any guidelines, control etc.. The Apex Court, while reconsidering the view expressed by the Delhi High Court has noticed

that "While Section 25 provides the modes of recovery of debts either by attachment and sale or arrest or appointment of a receiver, Section 28 provides for the modes of recovery in addition to the ones specified in Section 25. A perusal of the aforesaid provisions cannot lead one to the conclusion that the same are arbitrary, unreasonable or without any guidelines. It is quite clear that in order to recover the debts, the Recovery Officer has to attach and sell the immovable property and that for protection and preservation of the same, he has the power to appoint a Receiver for the management thereof.

The Court has further observed:

"By virtue of Section 29 of the Act, the provisions of the Second and Third Schedules to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962 have become applicable in the realisation of the dues by the Recovery Officer. Detailed procedure for recovery is contained in these Schedules to the Income Tax Act, including provisions relating to arrest and detention of the defaulter.

13. In view of the aforesaid observations made by the Apex Court, there is sufficient and more indication that the legislature by enacting provisions of Section 29 of the Act has adopted by reference the provisions of Second and Third Schedule to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962, the detailed procedure for recovery contained in these Schedules to the

Income Tax Act. For the purpose of disposal of the present case, we need not debate on the issue whether reference made to the provisions of Income Tax Act in Section 29 of the Act is by way of incorporation or by reference. It is suffice to observe that the provisions of Second Schedule and Third Schedule to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962, as far as possible are made applicable to the execution of recovery certificate granted by the Debt Recovery Tribunal by the Recovery Officer. The expression 'as far as possible' has been explained by the courts to mean that the principles are to be observed unless it is not possible to follow them in the particular circumstances of the case. In the Second Schedule to the Income Tax Act, there is a clause 81 under which there is a prohibition against arrest of women. The philosophy behind, for the legislature to make such a Provision, may be keeping in view how our society treats a woman. For us, woman is a mother, daughter, home maker and a social asset. Woman is indeed the Almighty's gift. Woman was created to be a partner to man in his struggle to overcome ignorance and acquire knowledge. Woman will elevate a man to higher levels that are angelic. Our tradition and culture is to worship a woman and a culture which worships women can never abuse them. In Manusmriti's verse, it is said, "where women are worshipped there Gods rejoice".

14. Now we refer to the decisions which prompted the learned Judge to refer this matter for consideration and decision by a

larger Bench. The first one is the decision of this Court in the case of **Cyril Britto vs. Union of India,** 2003 (2) KLT 879. The question that was posed before the Court was whether the provision under Section 56 of the Code of Civil Procedure which protects women from arrest or detention in execution of money decree is ultra vires of Article 14 and 15 of the Constitution of India. The court after detailed deliberation of the issue involved in the proceedings was pleased to observe:

> "Under the Code it is permissible to arrest and detain a woman who violates an injunction. It is also permissible to attach her property in case she does not carry out her obligations under a decree for restitution of conjugal rights. In both the situations, she faces the consequences of her own actions. However, keeping in view the prevailing customs, the Legislature has considered it appropriate to grant women a special protection against arrest and detention in the execution of a money decree. The legislative object is basically to grant a limited protection. For this limited purpose, Art.15(3) protects this provision.".

The Court has observed:

> "11. Learned counsel submits that no such exception has been made in the case of S.25 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Thus, there is no basis for a differential treatment under S.56 of the Code of Civil Procedure.
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> 12. It is undoubtedly true that S.25 does not provide for any special protection. However, there appears to be a clear rationale for it. The 1993 Act deals with recovery of

> debts due to Financial Institutions like Banks, etc.. The amount involved has to be Ten Lakhs or more. The provisions of the Act are applicable where a person has taken loan from a public institution like a nationalised Bank, etc.. Thus, in a case where a lady takes a substantial amount of money from a public institution, it is clear that she is engaged in some activity and is, thus, liable to the same process as any other judgment-debtor. In other words, when the two provisions are harmoniously construed, it is clear that the protection is not absolute It would not be available when the judgment debtor owes money as much as Rs.10 lacs or more, to a Financial Institution as contemplated under the 1993 Act. The dues under the Act have been treated differently. There is a clear basis treating the public dues differently from purely private. Thus a differential treatment under S.25 of the 1993 Act, without anything more would not make S.56 ultra vires.".

15. In our view, in the aforesaid decision, the Court was primarily considering the issue whether provisions of Section 56 of the Code of Civil Procedure which protects women from arrest or detention in execution of a money decree is ultra vires Article 14 and 15 of the Constitution of India. It was the stand of the learned counsel for the petitioner therein that Section 25 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 does not make such exception. The court while considering this issue without reference to Section 29 of the

Act, has observed that Section 25 of the Act does not provide for such protection to a woman. This observation, in our view, was made by this Court in the context of considering the vires of Section 56 of Code of Civil Procedure and not with specific reference to recovery of dues from the defaulters under the Debt Recovery Tribunals Act. Secondly, the learned Judges have tried to justify the arrest of women by keeping in view the object and Preamble of the Debt Recovery Tribunals Act. In our view, where the language of the statute is clear, the preamble of the Act cannot be invoked to curtail or restrict the scope of an enactment and it is also true, where the meaning of an enactment is not clear, the Preamble of the Act may be resorted to explain it. A Preamble though a key to open the mind of the legislature cannot be used to control or qualify the precise and unambiguous language of the enactment. It is only in case of doubt or ambiguity that recourse may be had to the Preamble to ascertain for the enactment in order to discover the true legislative intendment to ascertain the reasons for the enactment.

16. Now, coming to the discussion made by the learned Judges, they would commence with a statement that it is true that Section 25 of the Act does not provide for any special protection against the arrest of woman/women. This observation, in our view, as we have already stated, was without reference to Section 29 of the Act. In the absence of Section 29 of the Act, which provides for all the procedures which are required to be strictly adhered to, the Apex Court in the case

of Delhi High Court Association's case would have struck down the legislation on the ground that the same is arbitrary and without proper guidelines as had been held by the Delhi and Gauhati High Courts, but for Section 29 which by reference has been adopted the procedure prescribed under Second and Third Schedules to the Income Tax Act, which provides for all the safeguards while resorting to revenue recoveries under the Act.

17. In our view, even prior to Debt Recovery Tribunals Act, 1993, suits by banks and other financial institutions in respect of the amount claimed, used to be filed before the civil court even for recovery of amounts more than Rs.10,00,000/- (Rupees Ten Lakhs) from 'persons' who failed to pay the debts due to the financial institutions. The judgment and decree passed by the civil court was being executed as provided under the Code of Civil Procedure, which provided an embargo for arrest of woman, minor child, etc.. The only change that has been brought about by the enactment of the Debt Recovery Tribunals Act, 1993 is the establishment of Tribunal for expeditious adjudication and recovery of debts due to banks and financial institutions, if the debt is more than Rupees Ten Lakhs and the procedure before the Tribunal is also made simple by vesting in it, a simple summary procedure while considering the application that may be filed by the Banks and financial institutions. Apart from this, the legislature has not vested any further powers in the Tribunal by carving

out a special procedure for enforcement of recovery certificates by the recovery officer. In fact, the legislature by reference to the provisions of Second and Third Schedule to Income Tax Act, 1961, has provided the procedure for enforcement of a certificate issued by the Debt Recovery Tribunal by the Recovery Officer. In the case of a decree passed by the civil court, where the plaint claim is only less than Rupees Ten Lakhs, the decree if it exceeds Rupees Ten Lakhs, the same is to be executed by the Recovery Officer under the Act. It needs no elaborate discussion to hold that in any case, in that process, if the judgment debtor is a woman, she cannot be arrested. We will end it up by concluding that the provisions of the Act must receive an object oriented interpretation and not a pedantic approach. We fail to understand the reasoning of the learned Judges whose thinking has proceeded on the sole ground that when a lady takes a substantial amount of money from a public institution, she is also liable for the same process as any other judgment debtor. This reasoning of the learned Judges is firstly contrary to the provisions of the Act and more so contrary to our culture and ethos.

18. In **Mary Chacko vs. Jancy Joseph,** 2005 (3) KLT 925, the question before the court was whether a woman can be arrested in execution of an order passed under Section 27 of the Consumer Protection Act, 1986. In the said case, two issues were raised before the Court. One was for a declaration that Section 27 of the Consumer Protection Act, 1986 is ultra vires and unconstitutional

and for a declaration that the petitioner being a woman cannot be arrested and detained by the consumer forum in exercise of the powers under Section 27 of the Act. The Court while answering the issues raised has observed that the consumer forum while executing its order under Section 27 of the Consumer Protection Act has to keep in its view the provisions of Section 56 of the Code of Civil Procedure which states that the court shall not order the arrest and detention of a woman in civil prison in execution of a decree for payment of money. The Court also has referred to the observations made in **Cyril Britto's case** (supra) and has observed that the principle laid down in Section 56 cannot be imported when money is sought to be realised under the Recovery of Debts due to Banks and Financial Institutions Act. Again with great respect, we may say that the observation is only an obiter and that also suffers from the same difficulty. There is no reference to the relevant provision, namely Section 29 of the Act. Thus, **Mary Chacko's case** (supra) is also to be distinguished as one rendered per incurium. That apart, provisions of the Consumer Protection Act cannot be equated with that of the Recovery of Debts due to Banks and Financial Institutions Act especially when the order that has been passed is one for realisation of money.

19. In view of the above discussion, we hold that the recovery officer for realising the debts due under Recovery of Debts Due to Banks and Financial Institutions Act, 1993, is not authorised to arrest

and detain a woman in view of the specific provision contained in Rule 81 in the Second Schedule to Income Tax Act, 1961, which is made applicable by Section 29 of the Recovery of Debts Due to Banks and Financial Institutions Act.

Sd/-
H.L. DATTU,
CHIEF JUSTICE.

Sd/-
KURIAN JOSEPH,
JUDGE.

Sd/-
K.T. SANKARAN,
JUDGE.

DK.